INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	3
Argument	8
Conclusion	12

CITATIONS

Cases:

Azcona v. *Tibbs*, 12 Cal. Rptr. 232, 190 Cal. App. 2d 425	9, 10, 11
Beard v. *Atchison, T. & S.F. Ry.*, 84 Cal. Rptr. 449, 4 Cal. App. 3d 129	10
Curley v. *Vick*, 27 Cal. Rptr. 501, 211 Cal. App. 2d 670	9
Godwin v. *La Turco*, 77 Cal. Rptr. 305, 272 Cal. App. 2d 475	9
Hyde v. *Avalon Air Transport, Inc.*, 52 Cal. Rptr. 309, 243 Cal. App. 2d 88	10
Miglierini v. *Havemann*, 49 Cal. Rptr. 795, 240 Cal. App. 2d 571	10
Olsen v. *McGillicuddy*, 93 Cal. Rptr. 530, 15 Cal. App. 3d 897	10
Spiegel, Estate of v. *Commissioner*, 335 U.S. 701	9
Ulwelling v. *Crown Coach Corp.*, 23 Cal. Rptr. 631, 206 Cal. App. 2d 96	10, 11

Statute and regulations: Page

28 U.S.C. 1346(b) 2, 3

Air Traffic Control Procedures Manual, Secs. 344.9, 394.7, 411.7 ..... 2-3, 7

Miscellaneous:

Restatement of Torts 2d (1965), Secs. 286, 430, 451 10

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-320

GERALDINE L. LIGHTENBURGER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 460 F.2d 391. The opinion of the district court (Pet. App. 1e-75e) is reported at 298 F. Supp. 813.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1972 (Pet. App. 1b-2b). A timely petition for rehearing was denied on May 26, 1972 (Pet. App. 1c-2c). The petition for a writ of certiorari

was filed on August 24, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly set aside as clearly erroneous the findings of the district court that an airplane crash had been proximately caused by the negligence of the government.

STATUTE AND REGULATIONS INVOLVED

28 U.S.C. 1346(b) provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The Air Traffic Control Procedures Manual provides in relevant part:

Section 344.9:

> If an aircraft exceeds the lower and/or lateral limits of the prescribed safety zone to a point where, in the judgment of the controller, safety

of flight is likely to be affected, the pilot shall be instructed to climb to a specified altitude and fly a specific course, as appropriate.

* * * * *

Section 394.7:

To instruct a pilot to discontinue approach when the aircraft exceeds safety limits: IF RUNWAY NOT IN SIGHT, CLIMB IMMEDIATELY TO (altitude), TURN LEFT/RIGHT, HEADING (degrees), (Reason and further clearance, if appropriate), ACKNOWLEDGE.

* * * * *

Section 411.7:

When controllers foresee the possibility that departing or arriving aircraft might encounter rotorcraft downwash, thrust stream turbulence or wing tip vortices from preceding aircraft, cautionary information to this effect should be issued to pilots concerned.

NOTE.—Since the existence and effect of turbulence is unpredictable, the provision of the above information does not constitute the placing of responsibility on controllers to anticipate in all cases the need for such information.

STATEMENT

Petitioners brought this action under the Federal Tort Claims Act, 28 U.S.C. 1346(b); for damages resulting from the crash of a private airplane at Los Angeles International Airport, in which three persons were killed. The district court entered judgment for the petitioners, and the court of appeals reversed.

The plane, a Cessna 310G piloted by James Gordon, flew to Los Angeles from Las Vegas under an instrument flight plan. At 3:52 p.m. Gordon made contact with the Los Angeles Approach Radar Control and learned that the weather conditions were poor. With visibility deteriorating, Gordon elected to make a precision radar approach (PAR) (Pet. App. 3a).[1] At approximately 4:00 p.m., on the same radio frequency as that to which Gordon was tuned, Radar Control informed a United Airlines jet that the pilot of an American Airlines Boeing 707 ahead of the United flight had executed a missed approach when he could not see the runway (Pet. App. 3a, 7e). As a result, the United pilot declined to attempt to land (*ibid.*). This information, however, did not dissuade Gordon from attempting to land.

At 4:04 p.m., when Gordon was seven miles from touchdown, he was placed under the control of the PAR controller, who informed Gordon that "this approach will be terminated at the middle marker one-half mile from touchdown" (Pet. App. 4a). At that point, Gordon would either have to complete the landing visually or execute a missed approach.

At 4:06 p.m., Gordon entered on the designated glide path for the radar approach to the airport. When Gordon was three miles from touchdown, the PAR controller informed him, "latest weather indefinite ceiling zero sky obscured visibility zero with

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[1] On this type of approach, a special PAR controller guides the pilot down towards the runway; however, the pilot must conduct the actual landing visually (Pet. App. 7e-8e).

fog RVR[2] less than 1000 feet." The PAR controller asked Gordon whether he still planned to continue his approach in this weather, and Gordon answered "Ah put me right down on the runway" (Pet. App. 4a).

When Gordon was one mile from touchdown, the PAR controller told Gordon that he was a few feet above the glide path (Pet. App. 5a). At 4:10 p.m., with Gordon one-half mile from touchdown, the controller stated:

> Now oh ah fifteen feet from the glide path still a half mile from touchdown turn right one degree two five zero you're lined up with the left shoulder of the runway you passed the middle marker now coming up over the highway and going twenty five feet below the glide path adjust descent take over and complete your landing visually on runway two five left if you're not ah contact execute a missed approach climb westbound to VFR conditions on top. [Pet. App. 5a.]

Following this communication, the pilot apparently began to execute a missed approach by flying straight ahead and adding power, in preparation for climbing (Pet. App. 13e, 55e-65e).[3] The plane flew over the runway for 3000 feet at an altitude of 150 feet, going 1500 feet beyond touchdown (Pet. App. 5a). At approximately 4:12 p.m., the plane made a sudden vio-

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[2] The RVR (Runway Visual Range) is the measured visibility on the runway.

[3] An alternative method of conducting a missed approach is immediately to climb sharply (Pet. App. 65e).

lent 210 degree turn and crashed into a parking lot (*ibid.*). The plane's three occupants were killed, a North American Aviation employee on the ground was injured, and property of North American Aviation was damaged.

The district court found that the accident resulted from the government's negligence and awarded petitioners more than $1.6 million in damages. It concluded that the crash was caused by the Cessna encountering the wing tip vortices (*e.g.*, swirling turbulences created by a plane's wings (Pet. App. 15e-16e)) that had been created on the missed approach of the American Airlines jet some 12 minutes earlier:

> The evidence excludes any failure on the part of the pilot or the aircraft. The final violent maneuver was beyond the controlled capacity of the aircraft. The Court necessarily finds that it occurred as the result of turbulence from wing tip vortices, the only outside force acting upon the aircraft. [Pet. App. 53e.]

Further, the court found that the controller should have foreseen the possibility of the Cessna encountering the jet's vortices (Pet. App. 31e-32e). The district court determined that the government was liable on four separate theories:*

(1) That the PAR controller was negligent in that he knew, or should have known, that a hazard existed in the form of wing-tip vortices from the missed ap-

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* The theories are referred to here in the order cited by the court of appeals, not the district court.

proach of the American Airlines plane, and that he breached his duty to warn the pilot of the Cessna of this hazard (Pet. App. 29e-32e).

(2) That the PAR controller was negligent in failing to give the warning required by Section 411.7 of the Air Traffic Control Procedures Manual, the FAA's regulation for circumstances in which a controller foresees the possibility of wing-tip vortices (Pet. App. 45e-50e).

(3) That the PAR controller was negligent in that he gave a series of misleading and improper advisories to the pilot (Pet. App. 32e-44e) which "may well have induced confusion and disorientation in the pilot, exposing him, the passengers in the aircraft and the persons on the ground, and their property, to all reasonably foreseeable hazards, including the disorientation of the pilot and other forces such as the effects of wing tip vortices" (Pet. App. 44e).

(4) That the PAR controller was negligent in failing, although the plane at one point was 25 feet below the glide path, to use the language prescribed by the Air Traffic Control Procedures Manual, Sections 344.9 and 394.7, for this situation in informing the pilot of that fact (Pet. App. 50e-52e).

On the government's appeal, the court of appeals reversed (Pet. App. 1a-15a, 1b-2b, 1c-2c). It accepted the finding that the American Airlines jet's wing tip vortices had been the cause of the crash, but concluded that the district court's finding that it was foreseeable that the vortices presented a hazard to the Cessna was clearly erroneous. As a result, the first two

theories of liability, clearly predicated on the foreseeability of the wing tip vortices, collapsed. The third and fourth theories were similarly clearly erroneous, the court held, since even if the PAR controller was negligent in the advice he gave to the pilot, the failure to give proper advice was not causally connected with the crash, which was due to the unforeseeable wing tip vortices.

ARGUMENT

The ground on which the court of appeals decided the issue raised in the petition was that the negligence of the air traffic controller, if there was any, did not cause the accident. That ruling turns on questions of fact and of state law, is correct, and presents no issue warranting review by this Court.

Petitioners have abandoned the contention that the wing tip vortices created by the missed approach of the American Airlines jet twelve minutes before the crash, which were found to have been the cause of the crash, should have been foreseen by the PAR controller. The sole negligent conduct now relied upon is the failure of the controller to give an instruction to climb immediately in the precise words of the Air Traffic Control Procedures Manual. The court of appeals assumed *arguendo* that this failure constituted negligence but ruled for the government on the ground that the negligence was not the cause of the crash. Petitioners now assert that this decision was contrary to the law of proximate causation in California, contending that foreseeability of the hazard causing the

accident is not essential to establish proximate cause in that State.

This Court ordinarily does not grant certiorari to review decisions of courts of appeals on questions of state law (see, *e.g.*, *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701, 707-708), and this case presents no occasion to depart from that practice. Moreover, the decision of the court of appeals is fully in accord with California law. Petitioners' contention, in essence, is that had the PAR controller instructed the Cessna to "climb immediately" it would not have been in the particular location at which the wing tip vortices were encountered, and the crash would not have occurred. However, California distinguishes between this type of actual cause in the "but for" sense and the legal concept of proximate cause (see *Godwin* v. *LaTurco*, 77 Cal. Rptr. 305, 272 Cal. App. 2d 475); and, contrary to petitioners' assertion, foreseeability is a "principal" element of proximate cause in that State. *Curley* v. *Vick*, 27 Cal. Rptr. 501, 211 Cal. App. 2d 670; *Azcona* v. *Tibbs*, 12 Cal. Rptr. 232, 190 Cal. App. 2d 425.

The court of appeals correctly rejected petitioners' argument that, even though the "climb immediately" instruction was not designed to avoid the hazard of wing tip vortices,[5] the necessary causal relationship

[5] The persistence of wing tip vortices for more than one and a half minutes is extremely rare (Pet. App. 8a), and petitioners' expert witness had never heard of them persisting for longer than six and a half minutes; he characterized the circumstances that caused the crash as "a situation that doesn't happen once in a million landings" (Pet. App. 8a-9a). The

upon which to predicate liability could still be found. California requires that the negligence, to be legally actionable, must give rise to the kind of hazard that caused the injury. See, *e.g.*, *Azcona* v. *Tibbs*, *supra*; *Beard* v. *Atchison, T. & S.F. Ry.*, 84 Cal. Rptr. 449, 4 Cal. App. 3d 129, 140; *Restatement of Torts 2d*, § 430, Comment c. The intervening operation of an extraordinary and unforeseeable force, such as wing tip vortices persisting for an unprecedented twelve minutes, will break the chain of causation. *Ulwelling* v. *Crown Coach Corp.*, 23 Cal. Rptr. 631, 206 Cal. App. 2d 96, 118; *Azcona* v. *Tibbs*, *supra*, 190 Cal. App. 2d at 428; *Restatement of Torts 2d*, *supra*, § 451. Finally, it is clear under California law that where the allegedly negligent conduct entailed a violation of a statute or regulation, it is actionable negligence only when the statute or regulation was intended to afford protection against the harm that caused the accident. *Miglierini* v. *Havemann*, 49 Cal. Rptr. 795, 240 Cal. App. 2d 571; *Hyde* v. *Avalon Air Transport, Inc.*, 52 Cal. Rptr. 309, 243 Cal. App. 2d 88, 92; *Olsen* v. *McGillicuddy*, 93 Cal. Rptr. 530, 15 Cal. App. 3d 897, 902-903. See *Restatement of Torts 2d*, *supra*, § 286, Comment i.*

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court of appeals was justified in concluding that this extraordinary persistence of wing tip vortices was not one of the hazards with which the regulation calling for the "climb immediately" instruction was concerned.

* Petitioners' assertion that the court of appeals invaded the province of the trier of fact in reaching its conclusion on causation is also in error. The court of appeals accepted every pertinent factual conclusion of the district court and

Petitioners also urge review by this Court on the ground that important considerations of air safety are involved in the proper interpretation of the "climb immediately" regulation (Pet. 14-16). But this decision can have no impact upon the safe operation of the air traffic control system, since the decision of the court of appeals entailed no disagreement with the proposition that the "climb immediately" directive should have been given. Petitioners do not challenge the desirability of the regulations in question, which will continue to prescribe the standard of conduct for air traffic controllers in exactly the same fashion irrespective of the outcome of this litigation.

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simply found that the element of causation could not, under those facts, be established as a matter of law. While proximate cause is frequently a question of fact in California, it is not so where the facts are not subject to dispute, and only one conclusion may be drawn from them. *Azcona* v. *Tibbs*, *supra*, 190 Cal. App. 2d at 428; *Ulwelling* v. *Crown Coach Corp.*, *supra*, 206 Cal. App. 2d at 119. In the instant case, there is no question as to what the controller did and said, and the court of appeals accepted the conclusion of the district court as to the cause of the accident. All that remained was for legal conclusions to be drawn from these facts, a matter properly within the province of the court of appeals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General,

HARLINGTON WOOD, JR.,
Assistant Attorney General.

MORTON HOLLANDER,
ROBERT E. KOPP,
Attorneys.

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